



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

[REDACTED]
Docket No. 53-22
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

Ref: (a) Title 10 U.S.C. § 1552
(b) OPNAVINST 6110.1J

Encl: (1) DD Form 149 w/attachments
(2) NAVPERS 1626/7 Report and Disposition of Offense(s), 29 Sep 19
(3) NAVPERS 1070/613 Administrative Remarks, 29 Sep 19
(4) Eval for the reporting period 16 Nov 18 to 29 Sep 19
(5) Eval for the reporting period 30 Sep 19 to 15 Oct 19
(6) Advisory Opinion by Office of Legal Counsel (BUPERS-00J), 7 Jun 22

1. Pursuant to the provisions of the reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting to have the record of non-judicial punishment (NJP) imposed on 29 September 2019 removed from his Official Military Personnel Record (OMPF); the performance evaluation for the reporting period 30 September 2019 to 15 October 2019 removed from his OMPF; his recommendation for promotion to Chief Petty Officer (CPO/E-7) reinstated, and that he be promoted to CPO/E-7 with date of rank backdated to 16 September 2019.

2. The Board reviewed Petitioner's allegations of error and injustice on 14 June 2022 and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found the following:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner was selected for promotion to CPO/E-7 during 2019 while serving onboard the [REDACTED] ([REDACTED]). While participating in "Chief Season" Petitioner was required to perform a Physical Readiness Test (PRT) and did not perform sit-ups and push-ups as he had during two previous PRTs due to a purported back injury. Petitioner was then questioned by various members of the Chief's Mess regarding the veracity of his previous PRT test scores and was accused of lying about his previous "excellent" PRT scores. Prior to the questioning, Petitioner was not administered Article 31(b) rights warnings. Members of the Chief's Mess

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claimed that Petitioner admitted to falsifying previous PRT test scores and he was therefore sent before a Disciplinary Review Board (DRB) where he first received Article 31(b) warnings. Petitioner was then ordered to attend Executive Officer's Inquiry, where he denied falsifying his PRT scores. Petitioner's case was subsequently referred to Captain's Mast. See enclosures (1) and (6).

c. On 29 September 2019, Petitioner received NJP for violating Uniform Code of Military Justice (UCMJ) Article 92 for reporting grossly inflated test results for his 30 October 2018 and 1 May 2019 PRTs; Article 104 for altering a public record by giving false and grossly inflated test results for his 30 October 2018 and 1 May 2019 PRTs; Article 107—Specification I: with the intent to deceive, gave grossly inflated test results for his 30 October 2018 and 1 May 2019 PRTs, Specification II: denied making previous statements about giving grossly inflated test results for his 30 October 2018 and 1 May 2019 PRTs during Executive Officer Inquiry. Petitioner pled not guilty, the commanding officer (CO) found Petitioner guilty, and awarded Petitioner 10 days of restriction (suspended) and 10 days extra duty. See enclosure (2).

d. On 29 September 2019, Petitioner was issued an Administrative Remarks (Page 13) counseling entry notifying him that he was being retained in the naval service. The Page 13 entry also warned Petitioner to have no further misconduct or disciplinary issues while assigned to [REDACTED] ([REDACTED]), where to find assistance, consequences for further deficiencies regarding corrective actions due to his NJP. Petitioner was afforded the opportunity to make a statement. Petitioner acknowledged the entry and elected not to submit a statement. See enclosure (3).

e. On 6 October 2019, Petitioner was issued an Eval for the reporting period 16 November 2018 to 29 September 2019¹. Petitioner's Eval was marked 2.0 for block 35 performance trait 'command or organizational climate/equal opportunity' and 1.0 for block 36 performance trait 'military bearing/character.' The reporting senior commented that the Eval was submitted due to NJP held on 29 September 2019; Petitioner violated UCMJ Articles 92, 104, and 107; Petitioner was awarded 10 days of restriction (suspended) and 10 days of extra duty; the case concluded on 29 September 2019; and Petitioner not recommended for advancement. See enclosure (4).

f. On 10 October 2019, Petitioner was issued a transfer Eval for the reporting period 30 September 2019 to 15 October 2019² by the same reporting senior as Eval aforementioned. Petitioner's Eval was marked 3.0 for block 35 performance trait 'command or organizational climate/equal opportunity' and 3.0 for block 36 performance trait 'military bearing/character.' The reporting senior commented that the Eval was submitted due to Petitioner transferring to [REDACTED]. The reporting senior made the following comments on the Petitioner's performance during this 16 day reporting period:

¹ Petitioner's Eval for the reporting period 16 November 2018 to 29 September 2019 was not requested to be corrected or removed, however, the Board considered this Eval as part of their proceedings based on Petitioner's NJP.

² Contested Eval—Petitioner requested that the performance evaluation for the reporting period 30 September 2019 to 15 October 2019 be removed from his OMPF. However, Petitioner did not state the reason why said Eval should be removed.

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“EXCEPTIONAL MENTOR. As OI/OT LPO, he supervised 38 Sailors during [REDACTED] maintenance phase, training cycle, and ammo on load. His oversight was critical during [REDACTED] USW, EW, INTEL, and Explosive Safety inspections. His dedication to his Sailors resulted in the qualification of three Combat Information Center watch teams and contributed to 100% in-rate advancement.

TEAM PLAYER. As one of [REDACTED] only Combat Information Center Watch Officer's he was instrumental during [REDACTED] MON- N certification completing seven successful Sea and Anchor details. His dedication and knowledge directly resulted in the qualification of 4 Combat Information Center Watch Officers and 2 EW supervisors, increasing [REDACTED] overall combat readiness.

PROFESSIONAL EXPERT. As CSTT Tactical Lead, he oversaw the creation of 20 drill guides and training timelines. His expertise ensured [REDACTED] successful in preparing for SUW, USW, AW, and EW warfare area certifications. He was instrumental in drafting [REDACTED] EW, EMCON, MILDEC, and Commanding Officer Battle Orders to ensure [REDACTED] was prepared for its 2019 training cycle. He trained and qualified two qual-cert board members, four ammo safety observers, six team leaders, and 15 ammo handlers.”

The reporting senior closing comments stated “CTTI will be a valuable asset to any command he's attached to.”

See enclosure (5).

g. Petitioner states that he was selected for promotion to CPO during 2019 while serving onboard the [REDACTED] ([REDACTED]). While participating in “Chief’s Season” Petitioner claims that he reinjured his lower back and was unable to achieve an “excellent” score on the practice PRT as he had done on the previous two PRTs. Petitioner also states that he was accused of lying about his previous “excellent” scores. Petitioner also asserts that members of the Chief’s Mess claimed that he admitted that he had lied about his previous PRT scores, and that as a result, he was found guilty at NJP and the CO withdrew his recommendation for promotion and issued an adverse performance Eval, resulting in his failure to promote to CPO. Petitioner contends that he did not commit the offenses that he was found guilty of. Petitioner also contends that inadmissible evidence was the only evidence considered by the CO, the evidence considered was insufficient to prove by a preponderance of the evidence that he had committed the offenses charged and he was deprived of access to evidence and the ability to call witnesses on his behalf. Petitioner argued that finding him guilty of Article 92, Article 104 and Specification 1 of Article 107, UCMJ is unfair as it represents an unreasonable multiplication of charges and exaggerates his criminality.

h. The advisory opinion (AO) furnished by the Office of Legal Counsel (BUPERS-00J) determined that Petitioner met his burden to overcome the presumption of regularity attached to the official actions of the Navy. In this regard, the AO noted that 10 U.S.C. § 831 provides military members a right against compulsory self-incrimination, the protections of Article 31 are applicable to statements elicited for use at NJP, and Petitioner was never appraised of his Article

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31(b) rights against self-incrimination prior to the initial questioning by persons subject to the code regarding matters that would tend to incriminate him. The AO also noted that reference (b) provides that enlisted members shall have advancement or frocking deferred if they failed the most recent official Physical Fitness Assessment (PFA). Petitioner did not fail the PRT. He passed the PRT but did not score excellent and was apparently forced to continue to take immediate and multiple PRTs. Petitioner was eligible for advancement based on his initial passing score and the requirement to perform immediate and recurring PRT examinations is in direct contravention to reference (b). The AO determined that the mistreatment of Petitioner preceding the elicitation of the alleged incriminating statements coupled with the failure to properly advise Petitioner of his right led to a material error in the NJP and an injustice. The AO also determined that substantial evidence presented by Petitioner and third party statements regarding toxic command climate support the conclusion that Petitioner was subjected to illegal hazing rituals including sleep deprivation, temperature manipulation and physical distress immediately prior to the elicitation of the un-warned statements later utilized as the sole basis for conviction at the NJP.

The AO concluded that the petition should be granted as Petitioner has submitted substantial credible and compelling evidence to overcome the presumption of regularity and has demonstrated that a material error resulting in injustice has occurred. See enclosure (6).

BOARD MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the Board Majority and Minority found the existence of an error and injustice warranting partial relief.

Concerning Petitioner's request to remove the record of NJP imposed on 29 September 2019, enclosure (2), the Majority and Minority unanimously concurred with the AO that the failure to appraise Petitioner of his Article 31(b) rights against self-incrimination prior to the initial questioning constituted a material error, furthermore, the use of Petitioner's unwarned statements at NJP constituted a material error. The Majority and Minority found no evidence that Petitioner admitted to falsifying his previous PRTs and determined that the aforementioned procedural errors by Petitioner's chain of command constitute a basis to invalidate the NJP. The Majority and Minority also noted that the Page 13 at enclosure (3), served to counsel Petitioner and documented the NJP. The Majority and Minority unanimously determined that although removal of Page 13 from Petitioner's OMPF was not included in his petition, it should be removed as it was issued solely due to the NJP, and retention of any documents related to the NJP in Petitioner's OMPF would negatively affect him and should be removed.

Concerning Petitioner's request to remove the Eval at enclosure (5), the Majority and Minority determined that the Eval at enclosure (4) contained adverse performance trait marks and documented Petitioner's NJP, while the contested Eval at enclosure (5) is not adverse in nature, nor was the Eval written in error. The Majority and Minority thus unanimously determined that the Eval at enclosure (4), although not contested, shall be removed, and the Majority concluded that the contested Eval at enclosure (5) shall remain in Petitioner's OMPF.

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Concerning the reinstatement of Petitioner's advancement recommendation, the Majority determined that based upon the recommendation to remove the NJP, Page 13, and adverse Eval, Petitioner's recommendation for advancement should be restored. The Majority noted that the removal of the aforementioned adverse Eval would in effect void the CO's recommendation that Petitioner not be advanced to CPO/E-7.

Concerning Petitioner's request for promotion to CPO effective 16 September 2019, the Majority determined that based upon its decision to remove the NJP, Page 13, and adverse Eval, Petitioner should be promoted to CPO and promoted on the same effective date as if he had not received NJP and had his advancement recommendation not been removed.

BOARD MAJORITY RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show that:

Petitioner's naval record be corrected by removing enclosures (2), (3), and (4).

Petitioner's naval record be corrected by reinstating his recommendation for advancement to CPO/E-7 and promotion to CPO/E-7 effective 16 September 2019.

Any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed, or completely expunged from Petitioner's record, and that no such entries or material be added to the record in the future. This includes, but is not limited to, all information systems or database entries that reference or discuss the expunged material.

BOARD MINORITY CONCLUSION:

Note: The Board Majority and Minority unanimously concluded that Petitioner's naval record be corrected by removing enclosures (2), (3), and (4) as aforementioned.

Upon review and consideration of all the evidence of record, the Board Minority found the existence of an injustice warranting partial relief. The Minority concurred with the Board Majority that enclosure (5) does not contain any adverse performance traits, comments or errors. The Minority, however, noted that Petitioner's promotion recommendation was marked 'Promotable' and found that the 'Promotable' recommendation was inconsistent with Petitioner's previous and subsequent Evals. The Minority opined that the marks and promotion recommendation were most likely influenced by the events of the Petitioner's NJP. The Minority determined that enclosure (5) is also unjust and could negatively impact Petitioner's performance record.

In consideration of Petitioner's request to reinstate his advancement recommendation, the Minority was not persuaded by Petitioner's evidence or his argument that he did not falsify the two previous PRT scores. The Minority opined that it was the CO's intent that Petitioner not be

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advanced to CPO/E-7. The Minority determined that Petitioner's advancement revocation should stand³.

BOARD MINORITY RECOMMENDATION:

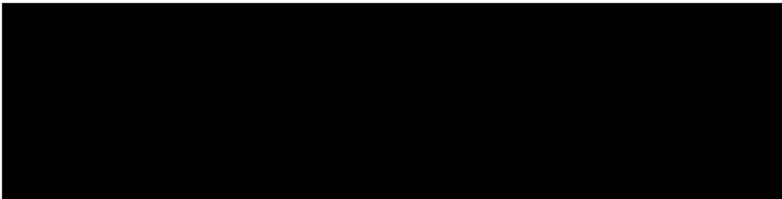
That Petitioner's naval record be corrected, where appropriate, to show that:

Petitioner's naval record be corrected by removing enclosure (2), (3), (4), and (5).

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. The foregoing action of the Board is submitted for your review and action.

8/3/2022



From: Assistant General Counsel (Manpower and Reserve Affairs)

Reviewed and Approved Petitioner's Request (Grant Relief)

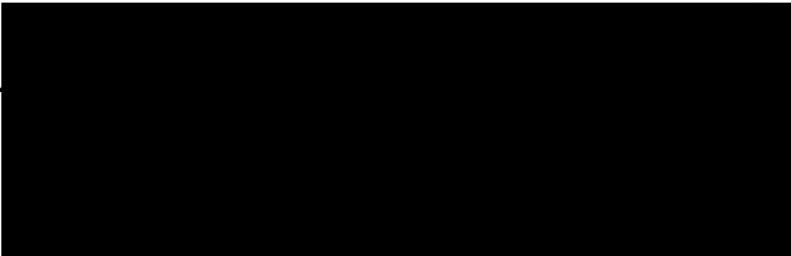
Reviewed and Approved Majority Recommendation (Partial Relief)

Reviewed and Approved Minority Recommendation (Partial Relief)

Reviewed and Approved Advisory Opinion Recommendation (Deny Relief)

Other Recommendation: Petitioner's naval record be corrected by removing enclosures (2), (3), (4), and (5). Petitioner's naval record be corrected by reinstating his recommendation for advancement to CPO/E-7 and promotion to CPO/E-7 effective 16 September 2019.

9/12/2022



³ The Minority did recommend to remove the NJP, Page 13, and recommendation.